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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1159

CARL J. SIMON, ROBERT H. KAISER, AND MELVIN S. FISHMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-34) is not yet reported. The memorandum opinion of the district court is set forth at Pet. App. B.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1969. A petition for rehearing was denied on December 10, 1969. Mr. Justice Harlan

extended the time for filing a petition for a writ of certiorari to and including February 7, 1970 and the petition was filed on that date.

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the trial court properly refused defense counsels' request to instruct the jury that it must acquit petitioners if their preparation of the financial statements conformed with generally accepted accounting principles.

2. Whether the court of appeals affirmed the conviction on a theory of criminal responsibility which the jury was specifically instructed not to consider.

3. Whether it was error for the trial court to deny petitioners' request for a non-jury trial when the government specifically refused to consent to that request.

STATEMENT

After a second jury trial[1] in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring knowingly to prepare and certify a false and misleading financial statement of Continental Vending Machine Corporation for the year ending September 30, 1962, and of using the mails to distribute the statement, in violation of 18 U.S.C. 371, 1341 and 15 U.S.C. 78ff. Petitioner Simon was sentenced to pay a fine of $7,000; petitioners Kaiser and Fishman were sentenced to

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[1] The first trial ended in a jury disagreement.

pay fines of $5,000 each (Pet. App. C). The court of appeals affirmed (Pet. App. A 1-34).

The pertinent facts are set forth in detail in the opinions of the courts below (see Pet. App. A 4-16; Pet. App. B 1-4). In summary the evidence showed that petitioners were respectively a senior partner (Simon), junior partner (Kaiser), and senior associate (Fishman), in the accounting firm of Lybrand, Ross Bros. & Montgomery, who were responsible for drawing up a financial statement for the firm's client, Continental Vending. Lybrand had been the auditors for Continental since 1956, and petitioners had been actively associated with the Continental account for varying periods, in each case more than a year, prior to the filing of the financial statement in February, 1963. In the course of preparing the report petitioners held numerous meetings both among themselves and with one Roth, Continental's president and controlling stockholder, in which they discussed problems relating to Continental's financial status—specifically, Continental's transactions with Valley Commercial Corp., an affiliate company also controlled and supervised by Roth—and reached agreements how that status should be reflected in Continental's financial report. They did not, however, consult with the Board of Directors concerning the problems which had come to light.

As reflected in the indictment, these problems centered about loans Continental made to Valley and Valley, in turn, made to Roth. The indictment alleged and the government proved, Pet. App. A 19-22, 27-28, that the financial statement petitioners pre-

pared for Continental for the year ending September 30, 1962, was—to petitioners' specific knowledge—misleading in several particulars: it did not disclose the loan transactions between Valley and Roth,[2] which left Roth indebted to Valley in approximately the same amount as Valley was indebted to Continental, and thereby rendered the "Valley receivable" item in Continental's financial statement uncollectible; it did not disclose that the collateral Roth posted was insufficient to secure the Valley receivable since approximately 80% of it consisted of Continental Vending securities, the value of which depended upon the collectibility of the receivable;[3] it did not disclose that the amount of the Valley receivable had increased —from $3.5 million to almost $4 million—between the year-end reported on and the date of actual certification; and it reduced the apparent amount of the Valley receivable by erroneously making it appear that notes payable to Valley by Continental Vending could be netted or offset against that debt (Pet. App. A 7-8; Pet. App. B 2-3).

ARGUMENT

The court of appeals thoroughly canvassed petitioners' claims and concluded that they were without

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[2] As petitioners knew, Roth had borrowed these sums to assist his own personal transactions in the stock market.

[3] Petitioners had failed to press Roth for additional collateral which he could have supplied; and apparently also knew—at least should have known—that much of the collateral which was posted was already subject to liens in favor of banks which had extended a sizeable line of credit to Valley.

merit. We agree and essentially rely upon the comprehensive opinion of the court below. We add only the following discussion focusing upon the precise issues raised in the petition.

1. Eight expert accountants were called by the defense at trial. They testified that in general, as to most of the knowing failures to disclose (but not as to the offset issue), ~~that~~ generally accepted standards of the accounting profession would not have required disclosure (see Pet. App. A 16-17; Pet. App. B 3-4). The government introduced contrary accounting testimony from two SEC accountants (Pet. App. A 17; Pet. App. B 3-4). Petitioners tendered an instruction to the trial judge to the effect that, if the jury found that petitioners had followed generally accepted accounting practices, they must be acquitted (see Pet. 13-14). The trial judge declined so to charge and instead instructed the jury that proof of compliance with generally accepted accounting standards was "evidence which may be very persuasive but not necessarily conclusive that [the defendants] acted in good faith, and that the facts as certified were not materially false or misleading" (Pet. App. A 18; Pet. App. B 4). The court further charged in this connection that the "weight and credibility to be extended by you [the jury] to such proof, and its persuasiveness, must depend, among other things, on how authoritative you find the precedents and the teachings relied upon by the parties to be, the extent to which they contemplate, deal with, and apply to the type of circumstances found by you to have existed here, and

the weight you give to expert opinion evidence offered by the parties. Those may depend on the credibility extended by you to expert witnesses, the definiteness with which they testified, the reasons given for their opinions, and all other facts affecting credibility * * *" (*ibid.*).

Petitioners contend that the refusal to instruct as they requested constituted reversible error as a matter of law (Pet. 11-15). As the court of appeals determined, however (Pet. App. A 18-19), the instruction given was correct, rather than the one sought, which would have made the "accountants' testimony * * * nearly a complete defense" (Pet. App. A 18). Adherence to generally accepted professional standards, like the following of personal or governmental legal advice, does not conclusively demonstrate a lack of criminal intent in a particular case. See *United States* v. *Sylvanus*, 192 F. 2d 96, 106 (C.A. 7), certiorari denied, 342 U.S. 943; *Linden* v. *United States*, 254 F. 2d 560, 568 (C.A. 4); *United States* v. *Schaefer*, 299 F. 2d 625, 630-631 (C.A. 7). In a particular case, the knowledge or context in which a person acts may make general principles inapt.

Thus it was here. As the court below stressed, the testimony of the defense accountants was that "*nothing in the financial statements themselves* negated the conclusion that an honest judgment had been made" (Pet. App. A 18; emphasis added). This did not, however, end the matter. Petitioners knew that the corporation was not being operated to benefit its stockholders but to benefit its president, Roth (Pet.

App. A 19-21).[4] In these circumstances, to follow accounting procedures fashioned for and sufficient in the normal case was not enough; disclosure "must be the rule" (Pet. App. A 20).

2. Petitioners contend that the court of appeals determined their responsibility for disclosure on a theory the jury never considered. They argue that the court's opinion rests on the obligation of petitioners to disclose the loans from Valley to Roth on the narrow ground that, to petitioners' knowledge, Roth was engaged in "dishonesty" and "looting" of Continental through the device of the loans to Valley—a theory which they state was removed from the jury's consideration by the trial court's instruction (see Pet. 17) that "there is no evidence that Continental's advances to Valley or Valley's advances to Roth were in any sense criminal. The testimony of Roth and Claire Gans was that there was no intention to steal the money, but rather the intention was to borrow and to repay it." But nothing in the court of appeals' opinion suggests that it doubted Roth meant to repay; its focus was on the undoubtedly improper diversion of corporate funds to personal use. The essential, and correct, rationale of the decision was that the duty to reveal the purpose of the loans to Valley was dependent, not upon petitioners' specific awareness that Roth was using the loans for any dis-

[4] This is not a case where the accountants took some steps to apprise outsiders what they knew, and the issue was whether that was enough. Here, no disclosures were made, and indeed the published statement conceals the true amount of the receivable by its erroneous reference to netting.

honest purpose, but upon the broader ground that to petitioners' knowledge the loans were being used to further the personal interest of Roth rather than the purposes of Continental. This would be true irrespective of whether such use involved "dishonesty" by Roth. It was this diversion of the funds for the personal benefit of the corporation's president which would be of critical relevance to a prospective reader of Continental Vending's financial statement. Thus, the court below summarized its holding, as to this aspect of the case, as follows (Pet. App. A 19):

> But it simply cannot be true that an accountant is under no duty to disclose what he knows when he has reason to believe that, to a material extent, a corporation is being operated not to carry out its business in the interest of all the stockholders but for the private benefit of its president. * * *

This theory of petitioners' duty to disclose was not foreclosed by the trial judge's instruction that there was no evidence of criminality in the loans to and by Valley. On the contrary, it was the very theory espoused by the government—namely that the loans from Continental to Valley should have been disclosed because it was proper to regard them as "indirect loans" to Roth (see Pet. 17). We point out, moreover, that petitioners do not appear to take issue in their petition[5] with the conclusion of the court below that sufficient evidence existed of wrongful

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[5] Other than the assertion in their Statement of Facts that the "netting" of the Valley receivable and payable was an "inadvertent error" (Pet. 7-8). Compare Pet. App. A 26-27.

knowing failure to disclose information as to the other aspects of the loan transactions referred to, *supra*. (See, as to these aspects, the court's discussion at Pet. App. A 21-23, 26-31.)

3. Before both the first and second trials, petitioners waived their right to trial by jury and moved for non-jury trial. The government, however, refused to consent to the waiver under Fed. R. Crim. P. 23(a), and demanded a jury trial. Both trial judges ordered jury trial, ruling that under *Singer* v. *United States*, 380 U.S. 24, they were bound to give effect to the government's refusal to join in the waiver. Petitioners contend that while *Singer* held Rule 23 (a) constitutional on its face, it "left open the question of how that Rule might be applied in cases where the petitioner's reasons for waiving jury trial might be more substantial" (Pet. 19). They argue that substantial reasons for a non-jury trial were present in this case because of its complexity, which, they assert, was so extreme that the jury could not be capable of understanding the evidence.

Petitioners' reliance upon *Singer* is misplaced. While petitioners refer (see Pet. 19) to language in *Singer* which states that, "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial," (380 U.S. at 37), they fail to consider the phrase "impartial trial" in the context of the language that immediately follows. Thus, this Court continued (*ibid.*):

> Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" [footnote citation omitted] or some other factor may render impossible or unlikely an *impartial trial* by jury. However, * * * this is not such a case * * * [emphasis added].

The fair reading of the entire passage is that this Court was not suggesting a possible exception to *Singer* where the case was difficult or complex. *United States* v. *Abrams*, 357 F. 2d 539, 549-550 (C.A. 2), certiorari denied, 384 U.S. 1001. On the contrary, the Court appears to have reserved decision as to the conclusiveness and propriety of the government's insistence upon a right to jury trial only in that type of situation where, because of an inflamed community or the notoriety of the case, it was unlikely that an "impartial" jury—*i.e.*, one not prejudiced against the accused—could be empaneled, and the prosecutor's insistence on trial by jury might be an indication of overreaching.[6]

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[6] *Amicus* distorts *United States* v. *Jackson*, 390 U.S. 570, 584, by omitting the italicized language from the following quotation:

> [T]he fact that jury waivers *and guilty pleas* may occasionally be rejected hardly implies that all defendants may be required to submit to a full-dress jury trial as a matter of course. [*Amicus* Br. at 9].

That statement stands for the proposition, not here in dispute, that defendants need not be submitted to the "spectacle and expense of protracted courtroom proceedings" and the "cruel impact" of public trial if they "greatly prefer not to contest their guilt." 390 U.S. at 584. It says nothing to the question whether, when trial *will* occur, the government can require that it be to a jury.

Finally, while it is true that the government's reasons for its choice here do not appear of record, it does not follow that it acted arbitrarily, or that it chose the less "accurate" tribunal. The fairness and accuracy of a tribunal include its ability to render a fair and accurate guilty verdict as much as a fair and accurate acquittal—a matter of some importance to the government in view of its inability to appeal from acquittals whether or not they appear to be "accurate." Here, prior experience with the trial of this case may have led the government's attorneys to believe that the judge who first tried it had strayed from impartiality, see 393 F. 2d 90 (C.A. 2); fear that another judge might also prove partial against it, however unfounded, serves to explain the jury choice. Furthermore, having made its choice, the government took all possible steps to assure that that tribunal would be an accurate one. "It is worth noting, although not critical, that the judge doubled the ordinary number of peremptory challenges, and that the jury was highly qualified." (Pet. App. A 4, n.1). Its foreman was a professor of history at Columbia University; other members included the Secretary of IBM World Trade Corporation, a retired executive of Kraft Foods, and a methods analyst with Morgan Guaranty Trust Company. Three jurors had studied accounting in college, and at least six were used to reading corporate reports in connecting with their stock investments. The jurors' questions to the court during their deliberations reflect considerable understanding of the case (Pet. App. A 32). In the

circumstances, no claim of partiality or incompetence can be made.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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